FEB 26 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 890

JOHN MEMOLO,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Opinion Below	2
Basis of Jurisdiction	2
Questions Presented	2
Summary Statement	3
Reasons for Granting the Writ	8
Affidavits in Support of Petition	10
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	19
Opinion Below	19
Basis of Jurisdiction	19
Statement of the Case	20
Specifications of Errors Urged	20
Argument	21
1. The jury panel was improperly trimmed by the trial judge	21
2. The trial court conducted himself in the presence of the jury greatly to the prejudice of your Petitioner	26
3. It was error to refuse to permit reference to the stenographic report which Government witness Wade required to refresh his recollection	58
CONCLUSION	62

CASES CITED.

PAGE

Glasser *v.* United States, 315 U. S. 60 (1941)..... 24

Morris *v.* United States, 149 Fed. 123 (1907)—C. C. A. 5. .8, 61

Sorrentino *v.* Graziano *et al.*, 341 Pa. 113 (1941)..... 57

STATUTES CITED.

Act of March 3, 1911, c. 231, Sec. 287; 36 Stat. 1166, 28 U. S. C. 424.....5, 8, 23

Act of June 29, 1932, c. 309; 47 Stat. 380; 28 U. S. C. 417a.....5, 8, 23

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United States of America.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered January 22, 1946, affirming the judgment of the District Court of the United States for the Middle District of Pennsylvania entered June 19, 1945.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is not reported. The trial court rendered no opinion.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938. The Judgment of the Circuit Court of Appeals for the Third Circuit was filed January 22, 1946, and the mandate was stayed for thirty days from February 6, 1946.

QUESTIONS PRESENTED.

1. Is the defendant in a criminal action deprived of his constitutional rights where the trial judge removes

from the jury panel, for reasons not stated of record, persons not requesting relief from jury duty who are believed by the court or the Government to be favorable to the defense?

2. Has the defendant in a prosecution for income tax evasion been deprived of his constitutional rights where the Government, without his consent, has seized his records, retained them for eight months and failed to return them until ten days before the trial?

3. Has the defendant in such a criminal case been given a fair trial in accordance with his constitutional rights where the trial judge has continually displayed criticism, ridicule and abuse of the defendant's counsel in the presence of the jury.

4. Was it error for the Court to refuse the defense permission to see a record which a Government witness used repeatedly to refresh his recollection which he did not object to showing?

SUMMARY STATEMENT.

This is a prosecution for income tax evasion for the years 1938 and 1939 on an indictment found March 13, 1945, and impounded until April 20, 1945 (1a). The case

was tried before Honorable William F. Smith, specially presiding in the District Court of the United States for the Middle District of Pennsylvania.

Subsequently the Petitioner, along with several others, was indicted upon other charges with Judge Albert W. Johnson, of the District Court of the United States for the Middle District of Pennsylvania. That indictment was returned in September, 1945. After numerous conferences with the United States Attorney with reference to the prosecution of Judge Johnson and two days before the expiration of the Statute of Limitations, this indictment was returned against the Petitioner for income tax evasion, notwithstanding the fact that some time prior thereto he had fully paid his income tax for the years in question.

Upon the occasion of the grand jury investigation of Judge Johnson in September, 1944, the Petitioner's books and records were taken from him without his consent, and were not again returned to him until an order of court required this. The Order was entered May 3, 1945 (3a), and the records were returned to the Petitioner on May 4 and May 5, 1945 (20a). The plea of Not Guilty was entered May 3, 1945, and the trial was held May 15, 1945. A Motion for Bill of Particulars, filed April 26, 1945, was denied on May 3, 1945. Information copied from Petitioner's books and records, was used by the Government as a basis for questioning witnesses at the trial.

The indictment was not opened until April 20, 1945, and the date for trial was not fixed until some time thereafter. The Petitioner made every effort to prepare for trial in the extremely short time allowed, but was unable properly to do so. He filed a motion for continuance of one week on the day of the trial. Notice of this applica-

tion for continuance was given some time in advance as witness the fact the Government filed in opposition an affidavit dated May 14, 1945 (25a). The application was denied, and the trial proceeded through eight days.

One of the exhibits offered in the trial of the case was the Petitioner's testimony taken some months before in the office of the Department of Justice in New York as part of the investigation, presumably of Judge Johnson. In this testimony, the Petitioner was asked whether any of the funds involved ever reached Judge Johnson (185a), and the response was emphatically in the negative. It is the Petitioner's belief that because of this testimony this prosecution for income tax evasion was pressed. Petitioner offers to testify that after the trial, Government counsel Goldschein informed him that if he had testified against Judge Johnson he would not have been prosecuted.

On the day of the trial, and before the trial of the case was actually begun, the court addressed the jury panel of 47 jurors and immediately excused 15, leaving but 32 jurors in the panel. The records in the clerk's office so indicate.

Under the

Act of March 3, 1911, c. 231, Section 287; 36 Stat. 1166; 28 U. S. C. 424,

and the

Act of June 29, 1932, c. 309; 47 Stat. 380; 28 U. S. C. 417a,

the parties are allowed a total of 19 peremptory challenges. When two alternate jurors are chosen, the total is 14 jurors. Thus, to permit 19 challenges in the choice of 14 jurors, a total of 33 persons on the panel is required. There remained in this case only 32 jurors.

The Petitioner particularly objects to the methods employed by the court in excusing jurors. Quite a number of those excused were excused on the court's own motion without any application from the juror. The court was asked by Petitioner's counsel that the names of the jurors excused be put into the record, but the court declined to do so (26a-27a). The court made the statement: "The right of the defendant is to exclude jurors, not the right to select them" (27a; Assignment 740a).

It has since become evident that some of the jurors excluded were those who in another case had reached a decision for the defendant. Undoubtedly the Department of Justice investigated the panel, as it had a right to do. It is the Petitioner's assertion that the court excluded, not only on its own motion but at the instance of the Department of Justice, jurors who were regarded possibly as favorable to the defendant. This was done not in the statutory method, by the exercise of peremptory challenges, but by excluding from the panel such persons. These proceedings are only briefly reported at 26a-29a. Affidavits asserting some of the facts are attached to this Petition. It is the Petitioner's position that the practices indulged in destroyed the fairness of the trial and he offers so to prove.

An examination of the Notes of Testimony of the trial will show that in repeated instances, the trial judge was most critical of the attorney for the defendant, and without cause. The Petitioner's defense was ridiculed, and his attorney abused repeatedly in the presence of the jury. The particulars of these occurrences are given in the Brief filed herewith. Their occurrence was sufficiently frequent and their vigor such as to strongly prejudice any jury against the defendant. It is the Petitioner's position that these practices deprived him of his constitutional right to a fair trial.

In the course of the trial, Government witness, Wade, testified about his previous examination of the Petitioner with relation to income tax matters for the years 1938 and 1939. This examination was stenographically reported, and Mr. Wade used the report repeatedly to refresh his recollection before taking the stand (361a-362a). He then took the stand and purported to testify from memory. When cross examination developed the existence of the stenographic report and of Mr. Wade's reliance upon it counsel for the Petitioner asked to see the stenographic report. At the time there was no objection from the Government (359a). The Court, on its own motion, objected to having the witness produce the stenographic report and refused to permit Petitioner's counsel to see it. These matters are reported beginning at page 359a. The court took the position that counsel for Petitioner could see the report if he would promise, before seeing it, to introduce it in evidence after he got it. Otherwise, the court stated, that Mr. Wade's files were confidential, and the court would not permit him to produce them. Thereafter, Government counsel interposed an objection in support of the position of the court.

Since the witness was, in effect, testifying from recollection of the stenographic report and not from his recollection of the occurrences, it is the position of the Petitioner that he was entitled to examine this stenographic report, and that it was error for the court not to permit this.

All the foregoing matters were made the subject of Assignments of Error.

The jury returned a verdict of guilty, sentence was imposed, and the judgment of the trial court was affirmed in a brief *per curiam* opinion by the Circuit Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE WRIT.

1. The action of the court in dismissing from the panel a substantial number of jurors is a violation of the

Act of March 3, 1911, c. 231, Section 287; 36 Stat. 1166; 28 U. S. C. 424,

and

Act of June 29, 1932, c. 309; 47 Stat. 380; 28 U. S. C. 417a,

2. The action of the court in dismissing from the panel a substantial number of jurors without reason other than possible favor to the defense was a violation of the rights of the Petitioner to a fair trial under the 5th and 6th amendments to the Constitution of the United States.

3. The continued and vigorous opposition of the trial judge to the Petitioner and his counsel in the presence of the jury was such a departure from the requirements of a fair trial as to deprive the Petitioner of his rights under the 5th and 6th amendments to the Constitution of the United States.

4. The refusal of the court, on its own motion, to permit counsel for Petitioner to see the stenographic transcript from which Government witness Wade established his recollection is in conflict with the decision of

Morris v. United States, 149 Fed. 123 (1907) C. C. A. 5.,

decided by the Circuit Court of Appeals for the Fifth Circuit.

WHEREFORE, the Petitioner submits herewith his Brief in support of his contentions, together with certain affidavits to establish the action of the court with respect to the jury panel, and prays that this Court grant a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

JOHN MEMOLO,
Petitioner.

ROBERT T. MCCRACKEN,
STANLEY F. COAR,
C. RUSSELL PHILLIPS,
Attorneys for Petitioner.

1421 Chestnut Street,
Philadelphia, Pa.

AFFIDAVITS IN SUPPORT OF ALLEGATIONS IN THE PETITION.

STATE OF PENNSYLVANIA }
COUNTY OF LACKAWANNA } *ss.*

ROBERT A. HULL, being duly sworn, deposes and says that the facts hereinafter set forth are true and correct: That he was drawn to serve as a Petit juror in the United States District Court in and for the Middle District of Pennsylvania to March Term, 1945; that he appeared for jury duty at the United States District Court Room in the Federal Building at Scranton, Pennsylvania, as designated on May 15, 1945, and that the case of the Government *vs.* John Memolo was called; that he was excused by Judge William F. Smith of the District Court of New Jersey, specially presiding, although no request for such excuse had been made.

(Signed) ROBERT A. HULL.

Sworn and subscribed to before me this 13th day of February, 1946.

(Signed) MARY TELL EVANS,
Notary Public.

[SEAL]

My commission expires Feb. 23, 1949.

MIDDLE DISTRICT OF PENNSYLVANIA }
STATE OF PENNSYLVANIA } *ss.*
COUNTY OF LACKAWANNA }

MAUDE C. MILLER being duly sworn according to law deposes and says:

I am a resident of the Borough of Forty-Fort, Luzerne County, Pennsylvania; I was notified to appear to

serve on the jury in the United States District Court for the Middle District of Pennsylvania at Scranton, Pennsylvania, in April of 1945; I reported at the Court House and in the month of April I was selected to serve as a juror in the case of the Government *vs.* Arthur A. Maskery; the jury could not agree on a verdict and so reported to the court, and the jury was discharged; the jury stood eight for conviction and four for acquittal, and I was one of the four jurors for acquittal; I was again notified to be present to act as a juror in Scranton, at the same court, and reported on the 15th day of May 1945; while I was in the court room, the case of the Government against John Memolo was called for trial; I was then excused by the Honorable William F. Smith, the Judge, as a juror, without making any request to be excused; after I was excused, I asked Judge Smith if the fact that I carried a cane was the reason for my being excused, and I stated to Judge Smith that my carrying a cane was the result of an operation which I had had on one of my legs over twenty-five years before, and that I was not incapacitated in any way; that I drove my own car and that I danced, and that it would be in no way a hardship for me to serve as a juror, and that I had served in the month of April on the Maskery case in the same court, and had remained out with the jury all night because the jury could not agree, and that I was one of four jurors who were for acquittal of the defendant, Maskery; I asked Judge Smith if he would re-instate me as a juror when the other jurors were called back, and he said he would.

MAUDE C. MILLER.

Sworn and subscribed to before me, this 14th day of February, A. D. 1946.

MARIE H. KELLY,
Notary Public.

[SEAL]

My commission expires Jan. 19, 1947.

STATE OF PENNSYLVANIA }
COUNTY OF LACKAWANNA } *ss.*

On this 12th day of February, 1946, personally appeared B. J. Biesecker, resident of Moscow, Lackawanna County, Pennsylvania, who, being duly sworn according to law, deposes and says that he was a member of the panel of jurors summoned for service to the March Term, 1945, United States District Court, Middle District of Pennsylvania; that he was called and served on the jury in the case of United States *v.* Arthur A. Maskery, *et al.*, No. 11,307 Criminal Docket, which went to trial on or about April 11, 1945 and terminated April 25, 1945 by disagreement of the jury; that the jury in said case stood eight for conviction and four for acquittal; that he was one of the four jurors which stood for acquittal, whereupon the said jury was discharged; that subsequently he was notified to appear for service on May 15, 1945, at which time he appeared, and there was called for trial the case of United States *v.* John Memolo; that the Hon. William F. Smith, District Judge, Specially presiding at said trial of John Memolo in the Middle District of Pennsylvania, dismissed the said B. J. Biesecker from jury service without any request by the said B. J. Biesecker, and without any reason being assigned for such dismissal.

B. J. BIESECKER.

Sworn to and subscribed before me this 13th day of February, 1946.

MARY E. GALLAGHER,
Notary Public.

[SEAL]

My Commission Expires Feb. 23, 1949.

STATE OF PENNSYLVANIA }
COUNTY OF LACKAWANNA } *ss.*

PETER J. ROSAR, being duly sworn according to law, deposes and says that he is a resident of the City of Scranton, County of Lackawanna, State of Pennsylvania, and a retired Ex-Chief of the Fire Department of the said City; that he was summoned as a juror for the March Term, 1945 and was called for service May 15, 1945 at which time he appeared in the District Court of the United States for the Middle District of Pennsylvania, being then and there held on the said 15th day of May, 1945; that there was called for trial the case of United States versus John Memolo; that without any request or prior information he was discharged as a juror by the Honorable William F. Smith, District Judge, United States District Court of New Jersey, Specially Presiding in the Middle District of Pennsylvania; that he thereupon inquired of Judge Smith the reason for his discharge, and the following conversation substantially took place between him and Judge Smith: I asked the Judge why I was discharged from the jury, had I done any wrong or was there anything against my character. He said no, wait a minute. I waited, he got a sheet up from the District Attorney's table, and he said, what is your name again? I was introduced to him first. I said, Peter Rosar, Peter J. Rosar. He said, yes, you are an Ex-City Official. I said, no sir, he said according to this list, you are an Ex-City Official. That don't make me a City Official. A City Official in my opinion in our City is a member of the Mayor's Cabinet, the Fire Chief is not, nor the Chief of Police either. Well, he said that is what they have you rated here as, an Ex-City Official, but still and all the Judge has the right to take people off. I said, well I am just curious to know if there is any reason. I always bore a good reputation in this town, if I have done any wrong I want to know, I don't believe I have an enemy

in the world that I know of. We have a right to dismiss anybody we want, otherwise there is nothing against you.

PETER J. ROSAR.

Sworn to and subscribed before me this 19th day of February, 1946.

MARY E. GALLAGHER,
Notary Public.

[SEAL]

My Commission expires February 23, 1949.

STATE OF PENNSYLVANIA }
COUNTY OF LUZERNE } *ss.*

I, Mary W. Schwartz, of 113 E. Green Street, Nanticoke, Pennsylvania, being duly sworn according to law, depose and say:

(1) That I was summoned for jury duty in the United States District Court, sitting at Scranton, Pennsylvania, during April of 1945, which is the first time I have been called for jury duty in any court.

(2) That when the case of the government against John Memolo was called and before the selection of the jury began, the following occurred: Presiding Judge Smith called out my name in the court-room and said: "You are the wife of the District Attorney of Luzerne County." I answered affirmatively. He then said: "The wife of a prosecuting officer is apt to be prosecution-minded. You are excused from further attendance."

(3) My name was not thereafter called.

MARY W. SCHWARTZ.

Sworn and subscribed to before me this 20 day of February, 1946.

ANTHONY DOBKOWSKI,
Notary Public.

[SEAL]

My Commission Expires Mar. 12, 1947.

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

JOHN MEMOLO, being duly sworn according to law, deposes and says that he is a resident of the Township of Madison, County of Lackawanna, State of Pennsylvania, in the Middle District of Pennsylvania, defendant in the Criminal Proceedings to No. 11319, March Term, 1945, United States District Court, Middle District of Pennsylvania; that since the trial of the said case which began on May 15th, 1945 and continued to May 23rd, 1945, he has interviewed jurors who were empanelled as the Petit Jury at said March Term, 1945, at which time the case against him was the only case for trial; that he has examined the record in the Office of the Clerk of the said District Court, which record discloses that 47 jurors were recalled for service on May 15, 1945; that of the said number, 12 were chosen as trial jurors, 2 were chosen as alternates, 10 were peremptorily challenged by the defendant as jurors and 1 additional challenge on the selection of an alternate juror; that the Government challenged 6 as jurors and an additional challenge of 1 alternate juror; that 4 jurors were excused by request; that 11 jurors were excused without request.

1. B. J. Biesecker was excused without any request on his part although he had been a juror at the same term in the case of United States versus Arthur A. Maskery, *et al.*, tried in the same District Court, and was one of four who voted for acquittal, resulting in a disagreement of the said jury and its discharge, his affidavit is furnished herewith.

2. Robert Hull, a juror summoned on said 15th day of May, 1945, is a Trust Officer and Vice President of Scranton Lackawanna Trust Company; that he was excused without request on his part with the comment by the Court substantially that as Mr. Hull was a lawyer and, as such, naturally inclined to uphold the law, that he would be excused. His affidavit is furnished herewith.

3. Mrs. Maude C. Miller was also a juror who had served at the same term in the case of United States versus Arthur A. Maskery, and was one of the four jurors who had voted for the acquittal of the defendant, Maskery; that she was excused from service in the case of United States versus John Memolo without any reason being assigned therefor; that when her name was announced as having been excused, she interviewed the Honorable William F. Smith and asked him if the reason for her being excused was because she carried a cane, or was not physically able to serve as a juror, and explained to him that carrying a cane was the result of an operation some twenty-five years ago, and that she was not incapacitated in any way; that she drove her own car, danced and serving on the jury was not a hardship as she had served in the month of April in the Maskery case in the same Court, and inquired if she would be reinstated as a juror after the selection of the jury for the trial of the case of United States versus John Memolo, and was told that she would be reinstated.

4. Mrs. Mary Schwartz, a juror also summoned and present on the said 15th day of May, 1945, was excused without any request on her part; that a colloquy ensued between her and the said Honorable William F. Smith, the substance of which is that having asked the juror what her occupation was and what her husband's occupation was, she reported that he was District Attorney of Luzerne County, one of the counties part of the Middle District of Pennsylvania. He thereupon excused her and said that as the wife of the District Attorney, she ought to be excused.

5. Peter J. Rosar was a juror summoned at the said term of court and at the time of the trial of the said case United States versus John Memolo; that without any request on his part he was excused from jury service; that he inquired of the said Honorable William F. Smith the reason for his being excused as a juror and wanted

to know for what reason, if any, he was disqualified, and when asked by Judge Smith what his occupation was he said he was a retired Ex-Chief of the Fire Department of the City of Scranton. He was thereupon told that he would be excused as the Court could dismiss a juror. His affidavit is furnished herewith.

6. Frank C. Ackley, retired Postmaster of Wyalusing, Bradford County, was discharged without request and without any reason being assigned for discharge from the said jury.

7. Ray C. Snyder, resident of Clarks Summit, Lackawanna County, in said Middle District was discharged without request and without any reason being assigned for such discharge as a juror on said 15th day of May, 1945.

The affiant further avers, deposes and says that he examined the record and the transcript of testimony; that upon request by his counsel as to why jurors were excused from service, the Court refused to set forth any reason, as appears by an examination of the transcript of testimony, with the exception of 3 jurors who were excused on their own application; that this affiant has not been able to interview all the other jurors who were excused and interrogate them as yet; that hereto attached is a copy of the Clerk's list of jurors summoned and recalled for service on May 15th at the time set for the trial of the case of United States versus John Memolo, no other case being set for trial at said recalled term.

The affiant is about to file in the Supreme Court of the United States petition for certiorari in the case of John Memolo versus United States, and hereby offers to prove all of the matters set forth in this affidavit and in that petition.

_____

(John Memolo)

Sworn to and subscribed before me this 26th day of February, 1946.

AMELIA H. SYREN
NOTARY PUBLIC
My Commission Expires January 2, 1949

PETIT JURORS, MARCH TERM, 1945, RECALLED FOR SERVICE MAY 15, 1945.

Name	*Occupation*	*Address*	*County*
Ackley, Frank G.	Retired	Wyalusing	Bradford
Brown, Mrs. Mattie	Housewife	Scranton	Lackawanna
Biesecker, B. J.	Laborer	Moscow	Lackawanna
Barnatovech, John	Real Estate	Taylor	Lackawanna
Butler, Mrs. Marie C.	Housewife	Forty-fort	Luzerne
Bremenski, Mrs. Josephine	Housewife	Swoyerville	Luzerne
Cobleth, Charles	Retired	Nicholson	Wyoming
Crosby, Mrs. Mary	Housewife	Noxen	Wyoming
Conrad, Mrs. Elizabeth	Housewife	Scranton	Lackawanna
Clark, M. J.	Representative	Pittston	Luzerne
Cole, Mrs. Louise	Housewife	Clark Summit	Lackawanna
Ellsworth, Edward	Retired	Kingston	Luzerne
England, Mrs. Dorothy	Housewife	Scranton	Lackawanna
Frantz, Fred	Real Estate	Clark Summit	Lackawanna
Fries, Arthur	Farmer	Aldenville	Wayne
Fuller, James H.	Retired Teacher	Scranton	Lackawanna
Grimes, Mrs. Faith	Housewife	Wilkes-Barre	Luzerne
Hartman, Frank J.	Retired	Wilkes-Barre	Luzerne
Healey, Mrs. Janet	Housewife	Waverly	Lackawanna
Hull, Robert	Trust Officer	Waverly	Lackawanna
Hudak, Pauline C.	Housewife	Wilkes-Barre	Luzerne
Hodgson, William A.	Farmer	Factoryville RD	Wyoming
Hibye, Miss Madeline	Clerk	Scranton	Lackawanna
Jackson, Jessie	Housewife	Scranton	Lackawanna
Jackson, Mrs. Mabel	Housewife	Wilkes-Barre	Luzerne
Lee, Ivy	Housewife	Scranton	Lackawanna
Mainwaring, Mrs. H. W.	Housewife	Forty-fort	Luzerne
Manley, Mrs. Anne Pitchford	Housewife	Scranton	Lackawanna
Matthews, Mrs. Jessie	Housewife	Wilkes-Barre	Luzerne
Miller, Mrs. Maude C.	Housewife	Forty-fort	Luzerne
Niemeyer, Miss Clare	Retired	Scranton	Lackawanna
Neville, Miss Emma	Clerk	Sterling	Wayne
Oman, Mrs. Sarah	Housewife	Scranton	Lackawanna
Peck, Mrs. Jane	Housewife	Waverly	Lackawanna
Roderick, Mrs. Eleanor	Housewife	Wilkes-Barre	Luzerne
Rosar, Peter J.	Inspector	Scranton	Lackawanna
Snyder, Ray C.	Retired	Clark Summit	Lackawanna
Scott, George	Insurance	Scranton	Lackawanna
Schwartz, Mrs. Mary	Housewife	Nanticoke	Luzerne
Sperling, Harry	Merchant	Wilkes-Barre	Luzerne
Thompson, Elias	Retired	Factoryville	Wyoming
Whalen, Mrs. Mary	Housewife	Scranton	Lackawanna
Williams, Mrs. J.	Housewife	Kingston	Luzerne
Williams, T. S.	Supervisor	Luzerne	Luzerne
Wilson, Dr. John	Physician	Factoryville	Wyoming
Wirth, William	Salesman	Scranton	Lackawanna
Yetter, Stanley	Insurance	Wilkes-Barre	Luzerne

Certified from the Record
Date: Feb. 20, 1946
[COURT SEAL] R. G. LOHMANN, Clerk
HEETOS J. JOHNS, Deputy Clerk

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The judgment of the District Court of the United States for the Middle District of Pennsylvania was entered June 19, 1945, and is not reported. The Opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 348) affirming the judgment of the lower court is dated January 22, 1946, and is not reported.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C., Section 347 (a), as amended by the Act of February 13, 1925, 43 Stat. 938.

Statement of the Case.

Petitioner seeks a review of the judgment of the United States Circuit Court of Appeals for the Third Circuit, filed January 22, 1946, affirming the judgment of the District Court of the United States for the Middle District of Pennsylvania, entered June 19, 1945, after a trial before Honorable William F. Smith, from the district of New Jersey specially presiding.

The facts have been set forth in the foregoing Petition and will not be repeated.

Specifications of Errors Urged.

The United States Circuit Court of Appeals for the Third Circuit erred:

1. In failing to hold that the constitutional rights of the Petitioner to a fair trial was denied by the action of the trial judge in removing from the jury panel, on his own motion, or on request of the Government, jurors regarded as favorable to the defense.

2. In failing to hold that the foregoing action of the trial judge with respect to the jury panel violates the statutes of the United States with reference to challenges.

3. In failing to hold that the conduct of the trial judge was prejudicial to such an extent as to deny the Petitioner the right of a fair trial in accordance with his rights under the 5th and 6th amendments to the Constitution of the United States.

4. In failing to hold that it was error on the part of the trial judge to refuse to permit Petitioner's attorney to examine stenographic notes used by a government witness to refresh his recollection on subject-matter concerning which he testified (359a; Assignment 821a).

5. In failing to hold that it was prejudicial error for the trial judge to deny a motion for continuance where the books and records of the Petitioner were taken from him by the Government eight months previously and returned to him only ten days before the trial.

ARGUMENT.

1. The jury panel was improperly trimmed by the trial judge.

The jury panel, summoned for use in the trial of this case, contained 47 jurors. The names of them appear in the office of the clerk of the trial court. They appear only in part from the stenographic notes of this trial.

Beginning on page 27a, it appears that 3 of the jurors were excused at their own request. From the clerk's office, it appears that altogether 15 jurors were excused. An investigation, partially completed by the Petitioner by a personal interview, shows some of them were excused without request. It has not been possible to contact all of them. Beginning on page 26a of the Record, a partial record of what took place is given. The Record states (26a):

> "At the opening of the trial the presiding Judge excused a number of prospective jurors. The Trial Judge excused additional jurors who had not made any request therefor as appears by the following, which was excepted to by the attorney for the defendant:
>
> 'Now, are there any further excuses?
>
> MR. COAR:—If Your Honor please, may I inquire if these jurors are excused on their own applications for excuse with the exception of Robert Hull?
>
> THE COURT:—Some of them on their own application some because of obvious physical disability. Some have heart trouble and a woman here has had a stroke. One man here is suffering because of impaired hearing and the like. I don't think any of those people would make competent jurors in a case that may last several days.
>
> MR. COAR:—May we have made part of the record, your Honor, the names of those jurors, who are excused on their own application.
>
> THE COURT:—No, the right to excuse jurors is within the discretion of the Court. The right of the defendant is to exclude jurors, not the right to select them. This is in the discretion of the Court, because on the information I have it is my judgment that these jurors because of matters that have come to my attention would not be competent jurors. Now, I don't intend to put forth in this record those reasons,

because it has nothing to do with this case. This applies not only to this case, but to any other case that is to follow. There is one juror I have excused, who is past beyond the age that I would consider a person for jury duty'."

It is respectfully submitted that the position of the trial judge is error. The rights of the parties are prescribed by law, and each party is given a number of challenges. The statutes involved are as follows:

Act of March 3, 1911, c. 231, Section 287; 26 Stat. 1166; 28 U. S. C. 424;
Act of June 29, 1932, c. 309; 47 Stat. 380; 28 U. S. C. 417a,

The total challenges thus afforded for the selection of a jury of 12 plus 2 alternates is 19. It is submitted that while the court may have the discretion of excusing jurors, he is not entitled to excuse them for no apparent reason or to excuse them for reasons favorable to the prosecution.

The probabilities are that the prosecution investigated the jury panel, as it had the right to do, and reported the result of this investigation to the court. There were on the panel several jurors who had just concluded the trial of a case in which Petitioner's attorney was also counsel, for another person. That trial resulted in a disagreement. It was because Petitioner's counsel was engaged in that other trial, that he asked for a continuance of this case. The prosecution opposed the continuance on the ground that that other case had resulted in a mistrial and was, therefore, concluded. This appears at page 25a, which is an affidavit suplied by the prosecution in opposition to the Motion for Continuance.

It does not appear of record, but it was a fact in that case that 4 of the jurors voted for acquittal. Some of

the jurors excused by the court without request were among those who voted for an acquittal in that other case. The names of two of them are Mrs. Maude C. Miller and B. J. Biesecker, whose affidavits are attached to this Petition. Efforts are being made to secure other affidavits, and to the extent obtained will be attached to this Petition.

It is respectfully submitted that the indications are strong to the effect that the action of the trial judge was not based on his own personal information, but on the investigation of the prosecution. The exclusion of any group of persons who might be favorable to a defendant in a prosecution, it is submitted, is not proper on the part of the trial judge. The purpose of allowing 19 peremptory challenges and beyond that challenges for cause, is in order to afford the parties a fair opportunity of selecting a jury. A jury ought not be drawn exclusively from persons known to be favorable to the prosecution.

Glasser v. United States, 315 U. S. 60 (1941).

In this case, several persons were convicted of conspiracy to defraud the United States. The conviction was sustained, and on certiorari was considered by this Court. The facts are disclosed by the following quotation from the Opinion of Mr. Justice Murphy at page 83:

> "Glasser sworn on information and belief that all the names of women placed in the box from which the panel was drawn were taken from a list furnished the clerk of the court by the Illinois League of Women Voters, and prepared exclusively from its membership, that the women on that list had attended 'jury classes whose lecturers presented the views of the prosecution,' and that women not members of the League, but otherwise qualified, were

systematically excluded, by reason of which affiant 'did not have a trial by a jury free from bias, prejudice, and prior instructions, and as a result thereof the jury was disqualified and this affiant's rights were prejudiced in that he was deprived of a trial by jury guaranteed to him by the laws and the constitution of the United States of America, and particularly the 5th and 6th amendment, all of which he offers to prove.' "

At page 86, Mr. Justice Murphy states:

"The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial."

The conviction was affirmed, but only for lack of proof of the allegations.

The Petitioner has obtained from the clerk of court the names of all the jurors on the panel and has the names of those who were excused without cause. These he offers to produce and prove. It is respectfully submitted that the action of the trial judge in arbitrarily reducing the jury panel deprived the Petitioner of a fair trial under the statutes prescribing the number of challenges to each party and also under the 5th and 6th amendments to the Constitution of the United States.

The case at bar is part of a general investigation of Judge Johnson which has caused a great deal of public interest. It is submitted that the rights of persons incidental to the main object of the Government's attack should not be sacrificed, no matter how laudable that main object may be. It is submitted that the Petitioner in this case should not be prejudiced in any way because

he may have made the path of the Government more difficult by declining to testify that some of the funds in his possession went to Judge Johnson (185a).

It is further submitted that nothing but a new trial can cure the abuses of the trial court.

2. The trial court conducted himself in the presence of the jury greatly to the prejudice of your Petitioner.

Throughout the trial of this case, the trial court was at least as vigorous in going after the Petitioner as was counsel for the prosecution. Again and again the court berated the attorney for the Petitioner. Mr. Coar, who tried the defense, is an eminent trial attorney of Scranton, with many years' experience and a fine reputation. In spite of repeated provocation from the bench, his manner was always most courteous to the court. This attitude was not reciprocated. On many instances, abuse and ridicule was heaped upon Petitioner's case and his attorney by the court. The following examples of this are taken from the records at the places indicated.

At page 208a referring to Government's Exhibit G-44, the court stated:

> "THE COURT:—No objection seems to be addressed to me. It is a private fight. I don't get into private fights."

At pages 216a-217a; with reference to the appointment of Mr. Maloney:

"THE COURT:—Let us not be technical about it. I don't think it makes an awful lot of difference who appointed him. Mr. Crolly was the Special Master and he thinks Judge Johnson made the appointment. Well, it is not unlikely to think so, because I assume it was in this court and Judge Johnson was the judge. So I suppose any appointment would have to be approved by the Judge.

MR. COAR:—Approved, yes, your Honor, I understand.

THE COURT:—What difference does it make who made it?

MR. COAR:—It may affect the credibility of this witness, your Honor.

THE COURT:—Ridiculous. He said Crolly was Special Master, through Jacob Greenes' influence he thinks he got the appointment. Crolly might have helped and he thinks the appointment was approved by Judge Johnson. How in the world——

MR. COAR:—Now, one question if I may on that subject.

THE COURT:—Go ahead:"

At pages 220a-221a the following occurred:

"MR. COAR:—If your Honor please, I submit that I am entitled to a yes or no answer.

THE COURT:—I submit that you are not. I submit that the witness will answer your question truthfully as he sees the truth, not as you hope to get it.

MR. COAR:—If the Court please, I do not think—

THE COURT:—Quiet.

MR. COAR:—May I——

THE COURT:—Quiet.

MR. COAR:—May I put an objection?

THE COURT:—Quiet. I have ruled. The witness will answer the question truthfully as he sees the

truth. He is the man who is under oath. The witness is instructed to answer the question. You may have an exception to the Court's ruling.

(Which exception is hereby allowed and sealed accordingly.)

Sealed.....U. S. D. J.

MR. COAR:—May I have an objection on the record to your Honor's statement?

THE COURT:—Yes."

At pages 239a-240a is found the trial judge's interference with the cross examination of Mr. Maloney:

"Q. E. J. Maloney & Company had a check made out to it?

THE COURT:—Yes, but you see he didn't get it. There is a difference, Mr. Coar, between having a check made out to you and getting it.

MR. COAR:—He got the check, your Honor.

THE COURT:—He did?

MR. COAR:—He had it in his hands and he endorsed it.

THE COURT:—The only testimony before this Court at this time is that Mr. Maloney received a check; that he saw a check in Mr. Memolo's office which he endorsed; that it was immediately taken from his possession by a Mr. Fear and that he then received $1200 in cash and never saw the check again. That is not getting a check in my judgment.

MR. COAR:—That isn't getting the proceeds.

THE COURT:—He just had a look at it.

MR. COAR:—No, your Honor, that is not getting the proceeds of it certainly.

THE COURT:—That is not even getting a check. That is the testimony at the moment. Now, I don't know what proof you are prepared to offer, but at the moment that is the testimony. He got a look at a check for $31,000."

At pages 240a-242a:

"Q. And you knew what you were doing when you signed it? (Blank check)

THE COURT:—But Mr. Coar, he is not on trial.

MR. COAR:—Of course he isn't.

THE COURT:—There is no assumption that he did not know what he was doing. It is difficult to believe that a man parted with close to $30,000 without knowing what he was doing, but he says then and there he saw a check for $31,075. He endorsed it, parted with it forthwith; that there was then given to him a check made out, a counter check, I think it was——

MR. COAR:—That is what he called it.

THE COURT:—And he signed it. From that day to this, he hasn't seen either the check or the money, is that it?

THE WITNESS:—That's correct.

THE COURT:—Except the $1200 in cash which was given to you?

THE WITNESS:—That's correct, your Honor.

THE COURT:—And $3000 and some odd dollars which was given in 1939 to pay a tax.

THE WITNESS:—That's correct.

THE COURT:—Let's go on.

By MR. COAR:

Q. So, Mr. Maloney, when you were asked to endorse that check you knew, did you not, that the proceeds of it were going to somebody besides yourself?

A. I did not know anything of the sort.

Q. You knew that the proceeds were not going to you, did you not?

A. I had a suspicion to that effect.

Q. Well, when you signed a check (laughter in court room).

THE COURT:—Later events confirmed it, I suppose."

At page 243a:

"Q. When was it understood?

A. When I was employed to work for the Bethlehem or Williamsport Wire Works. There is always the assumption that I was to be paid.

Q. Now, Mr. Maloney, I am not talking about assumptions——

THE COURT:—He hoped for the best but suspected the worst, as I understand his testimony.

MR. COAR:—If the Court please——

THE COURT:—Without any understanding.

MR. COAR:—I would like to find out if there was an understanding.

THE COURT:—Well, he says, 'No'. He said that there was no understanding."

At pages 244a-246a:

"Q. Did you ask Mr. Memolo, 'How about fees' for you and the men whom you had employed?

A. I did not.

Q. You were not interested in that?

A. I certainly was.

Q. Why didn't you ask about it?

A. (There is no response.)

THE COURT:—Well, Mr. Coar.

MR. CAMPBELL:—Just a moment.

THE COURT:—Now, just a moment. I don't know whether it is your memory that is bad or mine. My recollection of his testimony was simply this: As he said just now, Mr. Memolo opened the subject, by a question something in this substance, 'Mr. Maloney, if you had done this for an ordinary client, what would be your fee?' Mr. Maloney then answered, 'About $900'. In response to that, Mr. Memolo then reached down into a drawer of his desk, and some such place, and gave Mr. Maloney a roll of bills. He said, 'I think this will take care of it'.

Mr. Maloney then counted the bills and found he was the fortunate recipient of $1200.

Now I think that was the substance of the testimony. Now he didn't ask, because as he has testified yesterday, and he tells you now, in answer to the preceding question, Mr. Memolo opened the subject. Then you say to him, 'Why didn't you ask?'

MR. COAR:—Why, certainly, are we in cross examination to be limited to testimony which this witness gave on direct?

THE COURT:—Well, Mr. Coar, I have tried to be very patient. You are trying at times, because it is repetitious and repetitious and repetitious. Now, I want to allow you the widest latitude, but I surely don't want this jury and myself, at least, to sit here through the summer. Now on cross examination I am inclined to allow you the widest latitude, but not to the extent of having the same questions asked again and again. The question has been answered six times this morning. Now let's go on. Now, Mr. Coar wants to know why you didn't ask him about the fees, Mr. Maloney. Mr. Coar asked you why you didn't ask Memolo about the fees. Answer once again. Let it be the last time.

THE WITNESS:—Mr. Memolo raised the subject there when he asked me what I ordinarily would charge and I think I underestimated the amount. Perhaps, if I had asked for a larger amount, I would have received it.

THE COURT:—All right."

At pages 248a-249a:

"Q. When you put your endorsement on the check, was there anything to prevent you from putting the words 'for deposit' above your signature?

MR. CAMPBELL:—That is objected to as argumentative, if the Court please.

MR. COAR:—No, I submit that is not argumentative, if your Honor please.

THE COURT:—We are not trying Mr. Maloney, Mr. Maloney said he did not get a dollar of it, outside of the $1200 put in his hands and the amount to pay the income taxes. I do not care about Mr. Maloney's lack of judgment. We are not trying Maloney. I think he used terrible judgment. What difference does it make? The fact is—you may be able to refute it; I do not know—but the testimony at this stage is that the money did not come to him but went to Mr. Memolo, and it is this money that the Government contends actually increased Mr. Memolo's income for the year 1938 by the sum of approximately $30,000.

MR. COAR:—If the Court please, there is no evidence in this record yet that this money came to Mr. Memolo. I think your Honor is in error there.

THE COURT:—There is what?

MR. COAR:—There is no testimony yet that this money came to Mr. Memolo. The testimony of this witness is that he delivered the check.

THE COURT:—Surely there is no testimony that a gremlin walked away with it, either."

At pages 283a-284a:

"MR. COAR:—If the Court please, I move to strike his answer from the record in which he says he assumed that this came from Mr. Memolo's office.

THE COURT:—No. I will let it remain, because he only uses that for this purpose, having assumed that it came from there, he called Mr. Memolo rather than Mr. Maloney. That did not make it the fact that it came from Mr. Memolo's office. But under all the circumstances here the jury surely would have a right to infer what occurred. Just to recount briefly: Two days prior Mr. Fear brought to Mr. Memolo's office, a most unusual transaction for the bank and they opened

a bank account in the name of a man by the name of Maloney. He goes back and he opens the account. Two days later the bank gets a check signed by a Mr. Maloney. A messenger delivers it. Mr. Fear comes into possession of this check and he does not know the messenger, and with a proper caution before delivering this large sum in cash, he calls Mr. Memolo. Mr. Memolo does not say to Mr. Fear that he does not know who the messenger is or anything about it. Mr. Memolo assures him that it is all right. The jury may or may not, as it sees fit, infer from that that the check came from Mr. Memolo's office. That, coupled with Mr. Maloney's testimony that he left that same counter check in Mr. Memolo's office. I mean, you cannot isolate a circumstance and say it does not apply. But considering all the circumstances together, there is sufficient in my judgment, and the jurors are not bound by this, to infer the fact that the check came from Mr. Memolo's office. Where else, at the moment I do not know. I will let it stand. Let us go on."

At pages 349a-351a (Direct Examination of William J. Wade):

"Q. Did he produce any other books, records at that time?

A. With the duplicate deposit slips he also brought the bank statements that were copies of the ledger sheets from the bank; that is what they amount to.

* * * * * * *

MR. COAR:—We ask to have that stricken out; that latter part.

THE COURT:—You see it makes no difference.

MR. COAR:—Well, it makes this difference.

THE COURT:—Oh, Mr. Coar——

MR. COAR:—Now, Mr. Wade——

THE COURT:—Now, Mr. Coar.

MR. COAR:—Yes, your Honor.

THE COURT:—I took the time the other day to point out to you in the first instance the statute which is binding upon the Court as to the admission of all documents. Notwithstanding that I had this wholesale meaningless objection to every document that went into evidence. Now I realize that you have a client, whose rights are to be protected, but I realize, too, that there is a duty to the Court, a duty imposed upon members of the Bar, not to attempt to impede the trial by meaningless objections.

Now there are three words on the end of a sentence. They mean absolutely nothing to anybody. Yet we encumber the record by a motion to strike.

They may be stricken.

MR. COAR:—Now, if the Court please, may I say something?

THE COURT:—Yes.

MR. COAR:—Objections are made here on the theory of this case by counsel not because they are meaningless, your Honor, and I don't want this jury to get the impression that your Honor says that these are absolutely meaningless objections.

THE COURT:—Many of these objections are absolutely meaningless because I pointed out to you the statute which makes any record admissible in these proceedings and yet I have this objection that they are incompetent, that they are irrelevant, that they are immaterial. Now I say that objection becomes meaningless to me as a lawyer. I have ruled on it time and time again. There are now sixty some exhibits in evidence. You have an objection on the record to every one but four. Let's go on, please. I don't want to curtail you if you think it necessary but I can't picture in my mind——

MR. COAR:—Well, of course, your Honor please——

THE COURT:—objections of that degree are necessary. I have tried cases for fifteen years. I have sat on the bench for five. I have never had the experience I have had in this case. Now, let's go on.

MR. COAR:—If the Court please, were I not to take those objections that these were improperly admitted, then I would not be doing the thing that I ought to do and my only statement that I want to make now is if these records were brought by Mr. Memolo, this defendant, to the office and they were handed over to Mr. Wade, he can state what the records are, not what they amounted to. That is my only point."

At pages 379a-380a:

"By MR. COAR:

Q. Mr. Wade, the paper that you have just taken from your brief case——

THE COURT:—D-2 for identification.

Q. (Continuing):—is not your work, is it?

A. No, sir.

Q. Is that in connection with the 1938 receipts or 1939?

A. 1938.

Q. Do you likewise have one—not your work—for the year 1939?

A. No, sir.

Q. There was one for 1939 and there was one for 1938?

A. That's right.

Q. That you saw in your office?

THE COURT:—No. You see, Mr. Coar, it is unbelievable, but you do not remember his testimony a few minutes ago. He saw the 1938 in Mr. Naftulin's possession. He saw the 1939 in Mr. Memolo's possession in his office.

Is that right?

THE WITNESS:—That's correct.

THE COURT:—And since he saw the 1939 in Mr. Memolo's office he has not seen it since. That is my recollection of his testimony; not that he saw both in his office.

Go on."

At pages 381a-382a:

"Q. Aside from what Naftulin may have told you about that paper, do you know of your own knowledge why it was not returned to Mr. Memolo's office?

A. Yes.

Q. Can you tell us? This is of your own knowledge now, so we won't trespass on the ruling of the Court. If you cannot completely of your own knowledge, say so, please.

A. Well, I can't completely of my own knowledge.

THE COURT:—Do the best you can. Mr. Coar insists on this answer no matter how you got it. So even if it is town gossip that you got on the street corner, let us have it."

At pages 384a-385a:

"Q. Did Mr. Memolo tell you at that time that he wanted to pay the tax according to your determination?

A. Yes; he said he wanted to pay the tax.

Q. Did he not tell you why he wanted to pay the tax?

THE COURT:—You mean he is doing the Government a favor?

MR. COAR:—No, your Honor.

THE COURT:—We all want to pay, because the law says we should.

MR. COAR:—Understand that, your Honor.

THE COURT:—You mean he had a special reason for wanting to pay?

MR. COAR:—Yes.

THE COURT:—All right.

Did he tell you why?

THE WITNESS:—I think he said that he wanted to get the whole thing cleaned up."

At pages 491a-492a (cross examination of Barnet Naftulin):

"Q. My question is, did he not ask you a number of times, Mr. Naftulin, during the period of your investigation? Did he not ask you?

A. He did ask me; yes, sir.

Q. A number of times to tell him what the tax was so that he could pay it?

A. I wouldn't say—well, more than once, I would say.

Q. More than once?

THE COURT:—Mr. Coar, the duty and the obligation in the first instance is on the taxpayer. The Government has never sent me a bill. I walk in on March 15th with my income tax return and I pay it. They do not send me bills. The duty and the obligation in the first instance is on the taxpayer. Now, if he made such a request, any taxpayer, would your department at any time, with anyone, comply with any such request?

THE WITNESS:—No, he would get a complete report sometime later after the thing had gone through all the proper procedures until it reached the final computations.

THE COURT:—He would still be required to file his return?

THE WITNESS:—Yes, sir."

At page 494a:

"Q. Did you, Mr. Naftulin, make any charge of fraud or evasion against Mr. Memolo in the course of your investigation?

THE COURT:—What do you think this indictment arose out of?

MR. COAR:—I am asking this witness, if the Court please, what he did.

MR. CAMPBELL:—I think it is immaterial.

THE COURT:—No; I will let this witness answer.

By THE COURT:

Q. Did you ever charge him with fraud?

A. I didn't charge Mr. Memolo with fraud. I had nothing to do with that except—may I explain that?

Q. Yes. Explain it all.

A. This investigation had the possible indications of fraud, and therefore, it was my duty to discuss with Mr. Brownell, who was our group chief. That's as far as my duties are concerned. Then the Office decides the next procedure."

At pages 495a-496a:

"By MR. COAR:

Q. Then after Mr. Wade was assigned, you both worked on it and made your report back, and if any charge other than by way of indictment of fraud or evasion was made against Mr. Memolo, you would know about it, would you not, and you would get copies of any such information?

THE COURT:—You see, Mr. Coar, I sit here knowing full well what the procedure is and I hear you ask these very silly questions, and here is a man who, in the first instance, as he indicates to you, he makes a routine examination. There are signs which indicate to him, as he tells us in other ways, a possibility of fraud. He reports it to his group chief. His group chief requests the special agent of another department who usually investigates frauds and evasions cases,

both criminally and civilly. He enters the picture. The report is then made and goes back to the Internal Revenue Department. Is that right?

THE WITNESS:—Yes, sir.

THE COURT:—And from there it goes, if criminal prosecution is to result, to the Office of the Attorney General of the United States. Is that right?

THE WITNESS:—I believe so.

THE COURT:—You believe so? You do not know it that far?

THE WITNESS:—I do not know it that far.

THE COURT:—You see, it is not important whether or not he ever made a charge of fraud.

MR. COAR:—If the Court please, I submit that the questions that I submitted to this witness were not silly in view of the fact that he commenced an investigation in October of 1939 and there was no indictment found until March of 1945, and I would like to have this jury understand what took place in the meantime if I can get it——

THE COURT:—Mr. Wade did not enter the picture until 1941.

MR. COAR:—November, 1941, and he concluded his entire investigation, as did this witness testify, in 1943.

THE COURT:—But that does not change the situation. If they waited two years, three years, or five. They could wait six years under the Statute if they wanted to. The Statute of Limitations is six years in a case like this. I do not see what difference it makes. Do you want anything further from his witness?

MR. COAR:—No, your Honor."

At pages 497a-498a (relative to dismissal of jurors):

"THE COURT:— * * *

Now, so you may understand, at this stage of the proceedings usually the defense has a number of

motions to make. They have to be heard first, and I suppose counsel want a little time for that. There is no use in keeping you sitting around waiting for them to do that. I will have to stand that alone. Up until now I have had you to bear with me. All right; about 1:30 will be time enough. You may retire.

(Jury retired.)"

At pages 515a-516a, the Trial Judge interrupted the direct examination of the defendant and proceeded to cross examine him as to arrangements made with Greenes relative to the payment of money to him.

At pages 521a-522a, the Trial Judge again interrupted the direct examination of the defendant and proceeded to cross examine him relative to the money which the defendant alleged he had given to Mr. Decker, as follows:

"By The Court:

Q. How much of the fee did you give him in 1938?

A. 1938 I didn't give him any.

Q. None in 1938?

A. None in 1938. The money was not touched. It was left intact until 1939.

Q. You gave him $30,000 in 1939?

A. No, sir.

Q. When did you give it to him?

A. 1940 or 1941, I said. '40 or '41.

Q. You held it all until 1941?

A. That's right.

Q. Keeping it safe for Mr. Decker?

A. No; kept it in a safety deposit box until we could iron out our differences. We had some differences where he wanted more than I thought he was entitled to receive.

Q. It took you two years to iron out those differences?

A. I don't think it was two years. I can't tell you. It was either '40 or '41; I'm not able to say. It might have been '40.

Q. In 1938 you got a check from Bethlehem Steel, did you not?

A. That's right.

Q. And you gave him no part of that?

A. That's right. Neither did I take any part of it.

Q. But you had it in your safe deposit box, not in Mr. Decker's?

A. I did not.

Q. Where did you have it?

A. It was in the Chase National Bank.

Q. But in your account?

A. That's right.

Q. In 1939 you got a check?

A. Yes, sir.

Q. That likewise went into your account and not Mr. Decker's?

A. That's right.

Q. Then in 1941 you got around to paying Mr. Decker $30,000?

A. That's right.

Q. But of course, in the meantime this all rested in your account, I suppose?

A. Yes, sir.

THE COURT:—Go on, Mr. Coar."

At pages 523a-524a appears the following:

"By MR. COAR:

Q. In your two accounts, business account and attorney account in 1938, it has been testified that there were currency or cash deposits, specifically, on July 30, 1938 there was a deposit of $1,000 in the business account. It has been testified here by Mr.

Naftulin that you told him that money came from sock or from the safe deposit box. Isn't that a fact?

MR. CAMPBELL:—Just a minute. I am going to object, if the Court please, as not the best evidence. I think the records are the best evidence as to that.

MR. COAR:—As to what, Mr. Campbell?

MR. CAMPBELL:—He is asking what the records show.

THE COURT:—I have not seen anything like a record so far.

MR. COAR:—I have asked him if he told Mr. Naftulin something, your Honor.

THE COURT:—Yes; I understand what you asked him. He may answer whether or not he told Mr. Naftulin that. But, as Mr. Campbell suggests, that is not evidence of the fact. He did not say that here. There is a difference between having told Mr. Naftulin that and what the fact is. I do not know; maybe it is the same.

MR. COAR:—That will be brought out immediately.

THE COURT:—All right; go ahead. I will let him answer.

MR. CAMPBELL:—May the question be read?

THE COURT:—Yes. Read the question.

(Last question read.)

By MR. COAR:

Q. (Continuing) That you told Naftulin that.

A. I did. I didn't use any word 'sock'. I said from the vault."

At page 525a appears the following, which was very prejudicial to defendant's case:

"Q. Your brother had no access to this box, did he?

A. He did not. Might I say, answer your Honor by saying that a lot of other things belonged to other people in that box.

THE COURT:—I would not be surprised.

A. (Continuing) And they are legitimate and clean.

THE COURT:—I did not suggest that they were either legitimate or illegitimate. I just said I would not be surprised. Mr. Crolly's funds seemed to be there, your brother's funds seemed to be there. Maybe there were others; I do not know.

THE WITNESS:—No; they were other people's property, I say."

At pages 529a-534a appears the following, which was very prejudicial to defendant's case:

"By MR. COAR (direct examination of defendant):

Q. Was there any part of the total of these deposits, currency and cash in 1939, totaling $22,992.58, income to you in the year 1939 or earnings by you in the year 1939 or income to you in the year 1938 or income to you in the year 1938?

A. No, sir, except $7, which was interest.

THE COURT:—Of the $22,000 only $7 represented income to you?

THE WITNESS:—Yes, sir.

MR. COAR:—That's on the deposit, your Honor.

THE COURT:—I understand, on the deposit. Now surely, Mr. Memolo, there must be a record of that?

THE WITNESS:—I have said so.

THE COURT:—Where is it?

THE WITNESS:—I beg your pardon, sir.

THE COURT:—Where is the record, the record, the record? There is a record in 1938 showing this?

THE WITNESS:—Yes, sir.

THE COURT:—Where is it?

THE WITNESS:—And the slips that are here indicate it and prove it.

MR. COAR:—It is in evidence, your Honor.

THE COURT:—Mr. Coar, do not trifle with me, please.

MR. COAR:—I am not trifling with the Court.

THE COURT:—I have listened to this man testify now for close to one hour and I have yet to see any record for 1938 or 1939 that came from his office.

MR. COAR:—It has not required any record.

THE COURT:—It has not?

MR. COAR:—It has not required it.

THE COURT:—In my very humble judgment the record would be the best evidence. I have heard of this division of funds of Mr. Decker; I have heard of all these things, but I have seen no record of it and there were substantial funds involved, substantial, $110,000. At least when I compare it to a judge's salary it is some fund.

MR. COAR:—There is no question about that, your Honor.

THE COURT:—Why no.

MR. COAR:—There is no question about that.

THE COURT:—But here he speaks of a number of items involving $22,000 and he boldly says from the stand $7 represents fees. Now if that is true there ought to be a record somewhere.

MR. COAR:—He said there was a record of the $7.52 and the record is here in court under Mr. Naftulin's testimony.

THE COURT:—No, Mr. Coar, I said don't trifle with me. The record ought to be from Mr. Memolo's office, not that which the Government has introduced. The Government has produced it the round-way, the long way. The short way, however, should appear in Mr. Memolo's records, and those I have not seen as yet.

MR. COAR:—If the Court please, may I make this statement?

THE COURT:—Yes, surely.

MR. COAR:—The question here, the testimony of Mr. Memolo, is as to $7. That is already accounted for in Mr. Naftulin's testimony in which he testified that he saw the records in Mr. Memolo's office and from that he deducted from the total of $99.58 the income of $7.

THE COURT:—Now, Mr. Coar, Mr. Naftulin's conclusion and Mr. Memolo's conclusion differ very substantially. Mr. Naftulin determined from his examination of Mr. Memolo's record that the sum of $22,000 or in that sum there was a substantial amount representing income from business. Now Mr. Memolo takes the stand and without producing his own records, says $7 was fees of $22,000. Remember that on that sheet of Mr. Naftulin's there were fifty-eight entries to the sheet. Where is that record?

MR. COAR:—If the Court please——

THE COURT:—I don't know, I am merely asking.

MR. COAR:—This witness——

THE COURT:—I am not giving a riddle. I would like to know where it is. If it does not exist, let the witness say so. If it is here, let the jurors see it. I do not want to see it.

MR. COAR:—If the Court please, the witness has not said there was any record of anything, excepting that transaction, $99.58.

THE COURT:—How does he determine then of the $22,000 sum in question only $7.58, or whatever it is, represents fees?

MR. COAR:—He has testified from his knowledge that is what I can say to you, your Honor. Just as your Honor might state a fact from your own recollection.

THE COURT:—That will be the day and I have a good memory when I can take $22,000 in items and say item for item, $7.00. I merely asked the question, Mr. Coar. I don't care whether he does or does not

produce his records. I merely asked the question. If the records are available, we ought to have them. The defendant has taken the stand. Now, if they are not available, all right. He doesn't know what happened to them. And if he wants to keep them in his office, let him keep them there.

MR. COAR:—If the Court please, what you have said you have assumed that there were records.

THE COURT:—I merely asked. Mr. Memolo said he looked at some records.

MR. COAR:—As to that transaction, yes.

THE COURT:—Mr. Naftulin already testified that he once saw the records. I am not assuming anything. Are there records, Mr. Memolo?

THE WITNESS:—Of what, if your Honor, please.

THE COURT:—Of your business for 1938.

THE WITNESS:—The records of my business for 1938?

THE COURT:—Yes, 1938.

THE WITNESS:—Oh, yes. The business.

THE COURT:—Are they here?

THE WITNESS:—I think that some of them are in my brief case, the adding machine tapes are and they were produced here by the Government and we did not dispute them.

THE COURT:—Your ledger sheets showing these transactions with clients; I would like to see them. Are they here?

THE WITNESS:—The ledger sheets we had the ledger before this Grand Jury for several months.

THE COURT:—No, Mr. Memolo. Mr. Memolo, the 1938 records are they here today?

THE WITNESS:—May I be permitted to answer, if the Court please?

THE COURT:—Yes.

THE WITNESS:—All my business is not kept on the ledger. Some of it is kept in the file of the individual whose business it is.

THE COURT:—Well, are those files here to show how the sums were made up?

THE WITNESS:—The files are not here, because the statement given by Mr. Naftulin is presumed substantially correct and we have not disputed it, but we can get every file if this Court wants them."

At page 535a appears the following:

"Q. In other words, with respect to these amounts of money that were deposited in the safety deposit box, was there any record in the office kept?

A. No, sir, there is no record in the office, because they are in the box. If we couldn't trust the box without asking for a receipt, from somebody we trust, nothing else.

THE COURT:—Now, now. I did not practice law for thirty-six years but in the short time I did practice, I never heard of large funds of anybody, especially the funds not my own, that I did not keep an accurate record of right down to the penny.

THE WITNESS:—May I answer, your Honor?

THE COURT:—I am trying to find out if there are any records on that.

THE WITNESS:—I said there are no records, your Honor, excepting the envelope in which the money was put in the bank in the vault.

THE COURT:—All right, go ahead."

At pages 539a-541a:

"THE COURT:—Mr. Memolo, I have heard you time and time again say 'All this is a matter of record', but where are they?

THE WITNESS:—Well, the Chase National Bank is right here. I did not use a fictitious name.

THE COURT:—It is a matter of record every place but in your office, is that it?

THE WITNESS:—There is no necessity for keeping

a business record that the bank would keep. I did not know of any.

By Mr. Coar:

Q. Now, with respect to the—I am sorry, your Honor.

The Court:—Go ahead.

Mr. Coar:—Are you finished?

The Court:—I had better not say it.

Mr. Coar:—Are you finished?

The Court:—Yes, go ahead.

By Mr. Coar:

Q. With respect to the 1939 income tax return, Mr. Memolo, did you intend, wilfully or knowingly to attempt to defraud the United States Government of any tax due for the year 1939?

A. I did not and I did not account for all of the income for that year, that's true, because I had not used any part of it and I thought that I was justified in not making a return on it, as long as I had not used it. It was in the vault.

The Court:—You have been a member of the bar for thirty-six years and you thought that the income was not taxable until you used it?

The Witness:—In that particular account that is true, because Mr. Decker and myself had not settled our differences.

The Court:—But you had received the funds?

The Witness:—That's correct, and I still say so and I say so after having spoken to a man who is——

The Court:—Well, never mind what you spoke to a man about.

Mr. Campbell:—Just a moment.

The Witness:—I am not an expert on income tax.

The Court:—Well, you would not have to be.

The Witness:—I don't know about that. I know that they have a lot of tricks, these fellows, they are sharp. They know how.

THE COURT:—I have learned a lot of tricks myself but that I won't say where I have learned them. I just wondered where you got the idea that you did not have to report it until you used it.

THE WITNESS:—Well, I have been wrong. I am not here trying to argue. I am giving you my version of it.

THE COURT:—All right."

At page 543a (during cross examination of the defendant):

"MR. COAR:—If the Court please, my objection is that this is not cross examination as to what he testified to before the Grand Jury, not as to the latitude on cross examination.

THE COURT:—There is everything involved in this situation; the credit to be given the testimony of this witness going to the facts in the case. Is his testimony believable at all?

Go on, Mr. Campbell."

At pages 554a-556a:

"Q. Mr. Memolo, as a matter of fact, you not only received the Maloney money but you also received a large part of the fees paid to John Crolly, did you not?

A. I would prefer not to go into the Crolly matter. There's enough tragedy stalking this thing so far, and if you want to——

THE COURT:—Do not become sensitive at this stage of the proceedings. I am directing you to answer the question. It involves your income.

* * * * * * *

Q. Do I understand that Mr. Crolly was indebted to Mr. Greenes?

A. I couldn't tell you that, whether he was indebted or not.

Q. This is the same beer salesman, Mr. Greenes, that you are talking about?

A. That's right.

Q. Whose family necessities required him to borrow a small sum from you to——

MR. COAR:—Just a minute. We object to that, if the Court, please.

MR. CAMPBELL:—Cross examination, if the Court please.

THE COURT:—Yes; I will permit it. This man comes into court without one sheet of paper that represents a record and he calls on us to believe these statements, and I think they should be explored fully. I am going to let the Government counsel do it.

MR. COAR:—I have no objection to the exploration, your Honor. I object to the form of that question; no testimony of that fact. He is assuming that.

THE COURT:—The sole testimony, Mr. Coar, is that in this short period of time this beer salesman whom he threw out of his office in 1943 he lent $34,000 to.

MR. COAR:—There is no question about that. That is not what I am objecting to, your Honor.

THE COURT:—The same beer salesman, according to his testimony, who got somewhere between fourteen and seventeen thousand dollars. Just like that. $1,000 just floats around here like pennies. Go right ahead, Mr. Campbell. I will overrule your objection. You may have an exception.

(Which exception is hereby allowed and sealed accordingly.)"

At pages 574a-575a:

"Q. (Continuing) That Mr. Decker received any of these fees?

A. Well, I don't know that I said Mr. Decker individually. I don't think I said Mr. Decker in-

dividually until some time later. But I said that I had to pay out on those fees.

Q. On the $80,000, sir?

A. On all fees that I got; whatever they were.

Q. Let us take these Bethlehem fees. You say they were——

A. I'm talking about Bethlehem fees.

MR. COAR:—Won't you be good enough to let him answer the question?

THE COURT:—He does not answer the question. He answers everything but the questions. The question was simple: 'When did you first tell the agents that Mr. Decker got part of your fees?' That is the question. That has led to this long story.

MR. COAR:—That is what I would like to have answered.

THE COURT:—Mr. Decker is now dead.

MR. COAR:—That is what I would like to have answered, your Honor, if we can get it in the record.

THE COURT:—I want him to tell us. What year? What year? We have quibbled here with this thing all afternoon. I want to know what year? That was the question.

THE WITNESS:—I can't tell you the year. I don't remember the year."

At pages 614a-615a:

"THE COURT:—We have had eight character witnesses and eight are more than adequate.

MR. COAR:—I desire to state on the record, if the Court please, that the defendant desires to offer testimony of two additional witnesses as to the reputation of the defendant, John Memolo: David J. Reedy and——

THE COURT:—Mr. Coar, you are saying that only to impress the jurors.

MR. COAR:—I am not saying that to impress the jurors.

THE COURT:—What difference does it make who they are?

MR. COAR:—It does not make any difference excepting I am making an offer of proof and I have to state the persons.

THE COURT:—I have sustained the objection of the Government already. You are stating, for the purposes of the record, two additional witnesses.

MR. COAR:—That is right, your Honor.

THE COURT:—If you are not trying to impress the jurors, you are surely not impressing me because I do not care who they are. I mean the names. Names do not impress me. You are offering two additional witnesses. I stopped it at eight because yesterday afternoon I told you eight would be the limit and eight is the limit.

MR. COAR:—Your Honor, I do not recall your statement to that effect.

THE COURT:—That is my recollection of it, Mr. Coar, and that it shall remain. I have ruled in this case. Let us go on."

At pages 620a-621a (During cross examination of Mr. Naftulin):

"Q. My question, Mr. Naftulin, is what was the tax paid by Mr. Memolo for the year 1938?

THE COURT:—He just told you.

MR. COAR:—That is on the original return, your Honor. We have in evidence the supplemental returns.

THE COURT:—You have not asked him.

MR. COAR:—My question, your Honor, was what was the tax that Mr. Memolo paid for the year 1938. That would include the——

THE COURT:—Let us not try to deceive the jurors about it.

MR. COAR:—I am not trying to deceive anybody, your Honor.

My question was: 'Do you know what tax Mr. Memolo paid for the year 1938?' I did not limit that either to one or the other. That is the tax he paid.

THE COURT:—I know.

MR. CAMPBELL:—In view of that statement, I object to the question as immaterial, if the Court please.

THE COURT:—Yes; I sustain the objection to the question and the manner in which it is framed."

At page 623a, after counsel for both the Government and defendant had indicated they had completed their examination of the witness Naftulin, the Trial Judge took over the examination and proceeded to ask him a number of questions as to when the 1939 supplemental return was filed by the defendant, emphasizing the fact that it was five years after the original return, and after the witness's investigation had begun; and further at pages 623a-624a, asking the witness Naftulin the following question:

"THE COURT:—Oh, incidentally, Mr. Naftulin, did you see any books or records yesterday when you sat with this accountant?

THE WITNESS:—No, sir."

At pages 624a-625a:

"By MR. COAR:

Q. Did the computations to which you have testified here today require any records, do you know?

THE COURT:—It is not a question of requirement. I am just curious, Mr. Coar. I am just wondering whether or not he saw them, if he did. We have not seen them. I wondered if he did.

MR. COAR:—I wanted to know if the question was raised that there were any records kept from this witness yesterday.

THE COURT:—I simply asked if you saw anything?

MR. CAMPBELL:—I think it is obvious the computations were made on Mr. Coar's figures.

MR. COAR:—They were not on the assumption of Mr. Renard but on the assumption of the figures that Mr. Naftulin had previously offered in evidence here.

THE COURT:—Which were eliminated.

MR. COAR:——with the deduction——

THE COURT:—These computations, as I understand them, were made entirely on hypothetical questions propounded by Mr. Coar in substantially the same force as they were propounded here today, is that right?

THE WITNESS:—Yes, sir.

THE COURT:—And that did not require any records because Mr. Coar furnished the figures.

THE WITNESS:—Yes, sir.

MR. COAR:—Your Honor——

THE COURT:—Or his accountant.

THE WITNESS:—His accountant."

At pages 650a-651a:

"By MR. COAR:

Q. Mr. Greenes, in the year 1933, just that year alone, did you get any money from Mr. Memolo?

THE COURT:—Objection sustained.

MR. COAR:—I did not hear any objection.

THE COURT:—I have made it. I have sustained it. You may have an exception.

(Which exception is hereby allowed and sealed accordingly.

(Sealed).....U. S. D. J.)

THE COURT:—I am insisting that you be specific.

If you are not specific, we will be here much longer than the case should take. You called to his attention a loan or an advance of $10,000. If you have others in mind, be specific about them. I think, as the witness suggests, it is ten years ago."

At pages 652a-654a:

"MR. COAR:—If the Court please, I ask your Honor's permission to cross examine this witness year and year and ask him if during each of these years he received any money from Mr. Memolo.

MR. CAMPBELL:—I make the objection which I have heretofore made.

THE COURT:—I will let him answer.

By THE COURT:

Q. Do you recall whether or not you received any loan in 1934? With this instruction to the witness: If you cannot recall as to the year, you may say so. I will not compel you to testify falsely.

MR. COAR:—Just a minute, if the Court please. I object to that statement.

THE COURT:—I am talking to the witness, not to you, you let me finish.

MR. COAR:—I will. Then may I say something?

THE COURT:—These are instructions to the witness. You are under no compulsion to testify except as to the truth. If you do not recall, you are to say so and if you do recall you are to say that you do recall and testify accordingly.

Go on year by year.

MR. COAR:—If the Court please, may I have an objection on the record to your Honor's statement in the presence of this jury, the information that it is an attempt to have the witness testify to something that is false.

THE COURT:—What is your application, Mr. Coar?

MR. COAR:—My objection is to your Honor's re-

mark in the presence of this jury, and I now ask that a juror be withdrawn and this case continued.

THE COURT:—What?

MR. COAR:—And this case continued.

THE COURT:—The application is denied.

MR. COAR:—May we have an exception?

THE COURT:—You may have an exception.

(Which exception is hereby signed and sealed accordingly.

(Sealed).....U. S. D. J.)

THE COURT:—The jurors are instructed that no influence from the Court's instructions to the witness is to be gathered. Those were instructions only to the witness so that the witness might be guided in his testimony. You are not to infer that there is any suggestion at all that anyone is telling him to testify falsely."

At pages 655a-656a (During cross examination of Jacob Greenes):

"Q. You do not recall whether you received any money in 1934?

THE COURT:—He says he does not recall and the answer is adequate. I suggest to you again, Mr. Coar, that the only way to get the information is to be specific here. If Mr. Memolo has records of any such loans or anything of the like, it should not be difficult to be specific.

MR. COAR:—If the Court please, may I without reference to what records the defendant may have or may not have, cross examine this witness as to his knowledge?

THE COURT:—He said he does not recall, and I suggest that the answer is adequate. We cannot permit a witness to be browbeaten unnecessarily until you get an answer that you want.

MR. COAR:—If the Court please, I again take exception to your Honor's remark, 'browbeating' the witness.

THE COURT:—You may have an exception, Mr. Coar. Let us go on."

It is respectfully submitted that the caustic remarks and acid comment of the trial judge, manifested by these excerpts from the testimony, were sufficient to prejudice any jury, and they are not in accordance with the dignity with which a trial should be conducted.

Sorrentino v. Graziano et al., 341 Pa. 113 (1941).

In this case a judgment in a jury case was reversed, and a new trial ordered because of prejudicial remarks made by the trial judge, as well as his severe interrogation of one of the defendants' witnesses. At page 119, the Supreme Court of Pennsylvania quotes as follows from one of its earlier decisions:

"'* * * 'The practice of a judge entering into the trial of a case as an advocate is emphatically disapproved. The judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance, and from whom the litigants expect absolute impartiality. An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table. To depart from the clear line of duty through questions, expressions or conduct, contravenes the orderly administration of justice. It has a tendency to take from one of the parties the right to a fair and impartial trial, as guaranteed under our system of jurisprudence. Judges should refrain from extended examination of witnesses; they should not, during the trial, indicate an opinion on the merits, a doubt as to the witnesses's credibility, or do anything to indicate a leaning to one side or the other, without explaining to the jury that all these matters are for them'."

It is respectfully submited that a new trial should be awarded because of the very prejudicial remarks of the trial judge in this case in the presence of the jury. Since the investigations of Judge Johnson was already notorious, it is particularly important that those supposed to be connected with it be not unduly prejudiced.

3. It was error to refuse to permit reference to the stenographic report which Government witness Wade required to refresh his recollection.

The record clearly indicates that long before this prosecution had begun the Government acquired all the information it needed by examination of the Petitioner, as well as many of the other witnesses. Petitioner's books were seized and kept for eight months until ten days before the trial.

In the course of the Johnson investigation, the Petitioner was summoned to appear at the United States Attorney's office in New York City, and was examined. These Notes of Testimony (Exhibit G 41) were read in evidence, beginning at page 165a.

Another method of investigation employed by the prosecution was by means of the efforts of Mr. Wade who is a special agent for the Department of Revenue in charge

of fraud cases. Mr. Wade summoned the Petitioner to his office on November 6, 1941, and the ensuing examination was taken down stenographically. At the trial of the case, Mr. Wade took the stand and testified at some length as to the information he secured at that time, three and one-half years earlier. The cross examination of Mr. Wade begins at page 359a. There Mr. Wade stated that his examination of the Petitioner was taken down stenographically, and counsel for your Petitioner asked to see the notes. Mr. Wade produced the papers, but the court interrupted, and the following took place:

> "THE COURT:—Just a moment. Is it your intention to offer this?
>
> MR. COAR:—I do not know, your Honor. I would like to see it first.
>
> THE COURT:—That is not your privilege, unfortunately. The witness has not used it. The witness has not used it, Mr. Coar."

and at page 360a:

> "THE COURT:—The witness does not have to object, for that matter. I am fully aware of the protection placed around these files as a matter of law. If you have some information that this testimony differs from something that was said by Mr. Memolo and you think his report will disclose it and you wish to offer it, I am willing to let you have it because I think that justice then demands that you have it. But just to permit you to read it, especially since the witness has not used it; nothing could make this report evidential, you see."

Thereafter, the cross examination continued, and the following appears (361a-362a):

> "By MR. COAR:
>
> Q. Mr. Wade, before you went on the stand here today you have referred to that transcript of the dis-

cussion between you and Mr. Memolo held on November 6, 1941, have you not?

MR. CAMPBELL:—Objected to as immaterial.

THE COURT:—No; I will let him answer it.

A. I have referred to that many times, Mr. Coar.

Q. For the purpose of refreshing your recollection, have you not?

A. Yes, sir.

Q. And for the purpose of refreshing your recollection to enable you to testify in this case?

A. I have referred to it for various reasons, Mr. Coar, over a period of several years.

Q. And recently before you went on the stand you referred to it, did you not?

A. I didn't refer to it today. I referred to it recently; yes.

Q. Yesterday?

A. No, I don't believe I looked at it yesterday."

Thereafter, the request to see the transcript was repeated, and permission refused by the court.

It is clear that Mr. Wade was not relying on his recollection of the conversations of November 6, 1941, when he testified in May, 1945. He had consulted his notes many times. Since it was the defendant's contention that he did not know his income tax liability and had repeatedly asked the revenue agent to tell him what it was and had paid it when he found out what it was, it seems to the Petitioner important to find out whether three and one-half years before the trial anything of this sort had occurred, according to the transcript of the conversations held in the meantime, in the Government's own file. The case was no different than if the witness had held the notes of testimony in his hand and made reference to them. He had examined them many times in the interim, and only recently before trial again examined

them. It is too clear for argument that the witness was not testifying to the recollection of the occurrence, but to his recollection of what the notes of testimony reported. The case is like that of

Morris v. United States, 149 Fed. 123 (1907), C. C. A. 5, at 126.

Here, the court states:

> "The accused in a criminal case in the courts of the United States has a right to be confronted by the witnesses against him, and through and by his counsel given an opportunity to be informed and advised of all the evidence that is submitted against him. To permit the district attorney to furnish a paper to a witness, and allow the witness to testify from and by that paper, without having previously exhibited it to the defendant on his demand, is practically to deny him the right of being confronted with the witnesses against him, and tends to deprive him of full opportunities to defend himself. We understand it to be the universal rule of evidence in the courts of this country that, where a witness is permitted to examine and refresh his recollection with a paper, it is to be tendered to the other side, for inspection just as soon as it has been identified. This rule is found in all the textbooks, and, if numerous adjudged cases declaring it are not found on all hands, it is because of the absence of *nisi prius* reports, and because so few trial courts have ever denied the right in question."

It is respectfully submitted that the correct rule of law is recited in the Morris case. The action of the trial judge in this respect was assigned for error, and the action of the Court of Appeals for the Third Circuit in affirming the judgment below is in conflict with the foregoing decision of the Fifth Circuit.

CONCLUSION.

An examination of the record will show that the Government investigated this case, at least as early as 1941, and had no difficulty in getting all the information it desired. It has all the tax to which it is entitled. In one respect only did it fail. The prosecution was not able to get Mr. Memolo to testify that any of the funds he had received went to Judge Johnson or were intended for Judge Johnson. Two days before the period of the Statute of Limitations expired, an indictment was found. It was impounded until after the statute of limitations had run, and then was quickly brought to trial. It was called only once, and it was tried that day and on the succeeding days.

While the record shows a motion for continuance was filed the day of the trial, there was nothing unexpected by the motion because in opposition to it the prosecution filed an affidavit dated the preceding day (25a).

The Petitioner's books and records, taken from him without his consent in September, 1944, were returned only after an order of court entered to that effect, and he received them on May 4 and May 5, 1945, with the trial starting on May 15.

With this introduction, there followed the extraordinary procedure of this case. First, the judge excused a number of jurors who did not ask to be excused. The judge who tried the case is from Newark, New Jersey. He is not a local resident of this district. He could not have known these jurors of his own knowledge. He must have acquired some information to form a basis for dismissing some of them, without request.

The experience of most trial judges, as witnessed from the position of counsel, is one of difficulty in secur-

ing sufficient jurors, particularly in times of labor shortage. Many jurors do not like to serve, and try to present excuses. The effort of the court is to resist these excuses. It is most unusual for the court, on its own motion, to dismiss almost one-third of the panel largely without request, and then to decline to give any reason whatever for this action. It is all the more remarkable when it is noted there were not sufficient jurors left in the panel to afford the parties the number of challenges authorized by statute.

It is respectfully submitted that these facts are sure indication that the court was informed from some source of reasons why these jurors might be undesirable. Those reasons were not supplied by the defense. The only circumstance not appearing of record is the number of those discharged. This is of record in the clerk's office, and Petitioner offers to prove it. These circumstances were not an auspicious opening in a forum required to administer a trial fairly.

An examination of the record thereafter will show that time and again the court ridiculed the defense, made caustic remarks, and otherwise expressed the court's opinion about the dubious nature of the defense. When it is borne in mind that this occurred in a case already widely publicized, it can be readily understood that the jury could not help but be prejudiced.

There are many errors in the course of the trial which have been made the subject of assignments of error, but are not available as reasons for granting this certiorari. It is submitted, however, that the general unfairness of the trial is a denial of the constitutional rights of the Petitioner.

It is further submitted that the refusal to require the Government witness, Wade, to produce the notes of testi-

mony, taken three and one-half years before was error, which is not in accord with the law generally, and is in conflict with the rule laid down in the Fifth Circuit in the Morris case.

It is, therefore, respectfully submitted that it is appropriate for this Court to grant the Petition for Certiorari prayed for.

Respectfully submitted,

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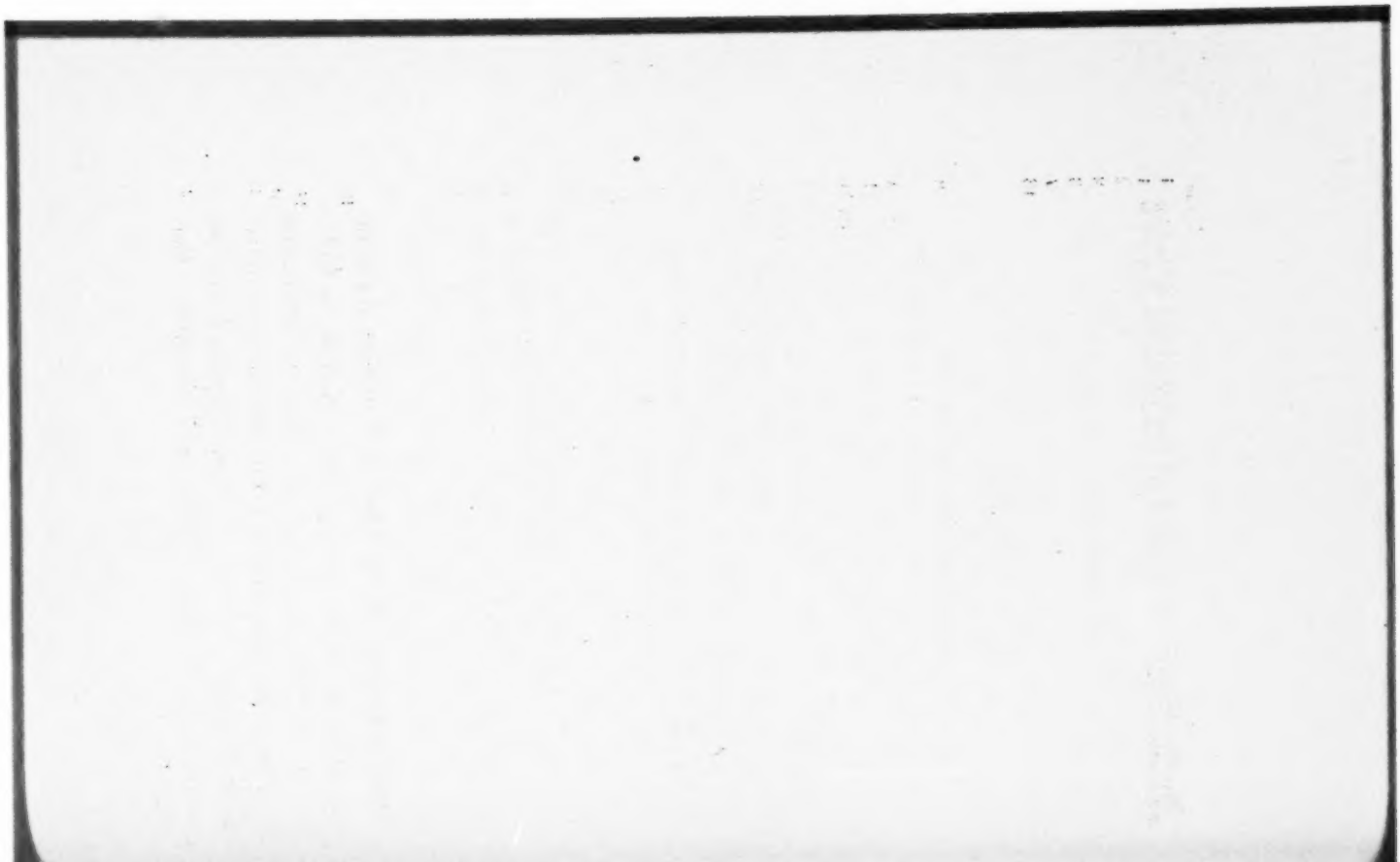
INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:	
Blair v. *Oesterlein Co.*, 275 U. S. 220	8
Chicago, St. P., M. & O. Ry. Co. v. *United States*, 322 U. S. 1	8
Fryer v. *United States*, 11 F. 2d 707	11
Glasser v. *United States*, 315 U. S. 60	10, 11
Hayes v. *Missouri*, 120 U. S. 68	8
Holt v. *United States*, 218 U. S. 245	8
Hopt v. *Utah*, 120 U. S. 430	8
Horning v. *District of Columbia*, 254 U. S. 135	10
Lias v. *United States*, 51 F. 2d 215, affirmed, 284 U. S. 584	8
Little v. *United States*, 93 F. 2d 401, certiorari denied, 303 U. S. 644	12
Meyer v. *United States*, 67 F. 2d 223	11
Moore v. *United States*, 132 F. 2d 47, certiorari denied, 318 U. S. 784	10
Morris v. *United States*, 149 Fed. 123	12
Pacific States Co. v. *White*, 296 U. S. 176	8
Pfoff v. *United States*, 85 F. 2d 309	10, 11
Simon v. *United States*, 123 F. 2d 80, certiorari denied, 314 U. S. 694	10
Sonzinsky v. *United States*, 300 U. S. 506	8
Spies v. *Illinois*, 123 U. S. 131	8
Tex. & Pac. Ry. v. *Hill*, 237 U. S. 208	8
United States v. *Domres*, 142 F. 2d 477, certiorari denied, 323 U. S. 723	12
United States v. *Goldman*, 118 F. 2d 310, certiorari denied, 313 U. S. 588	12
United States v. *Lee*, 107 F. 2d 522, certiorari denied, 309 U. S. 659	11
United States v. *Warren*, 120 F. 2d 211	10
White River Co. v. *Arkansas*, 279 U. S. 692	8
Statutes:	
Internal Revenue Code: Sec. 145 (26 U. S. C. 145)	3
Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 145	2



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 890

JOHN MEMOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the Circuit Court of Appeals for the Third Circuit (R. 848a–849a) is reported at 152 F. 2d 759. The District Court rendered no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 22, 1946. (R. 849.) Petition for writ of certiorari was filed on February 26, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Code, promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Is the defendant in a criminal action deprived of constitutional rights where the trial judge on his own motion removes certain persons from the jury panel prior to selection of the jury where no prejudice is shown by the defendant?

2. Did the trial judge so conduct himself in the presence of the jury as to prejudice the defendant?

3. Where prior to taking the stand a witness has referred to a document for the purpose of refreshing his recollection but has not utilized the document while testifying, is it error for the court to refuse opposing counsel's request to have the document produced and examined by him?

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 145. PENALTIES.

* * * * *

(b) Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

Section 145 (b) of the Internal Revenue Code is identical.

STATEMENT

The indictment in this case is in two counts, the first charging petitioner with wilfully attempting to evade and defeat payment of a substantial part of his individual income tax for the calendar year 1938, in violation of Section 145 (b), Revenue Act of 1938, and the second count charging him with attempting to defeat and evade a large part of his individual income tax for the calendar year 1939, in violation of Section 145 (b), Internal Revenue Code. (R. 6a–13a). Petitioner was found guilty by a jury on both counts and sentenced to imprisonment of eighteen months and a fine of $1,000 on each count, the sentences to run consecutively and not concurrently. (R. 4a.)

Petitioner was a practicing lawyer in Scranton, Pennsylvania for approximately thirty-six years. (R. 506a.) The evidence showed that in 1938 he had received gross income from his profession in the amount of $162,026.01, whereas he had reported for income tax purposes gross fees of only $42,357.60. The evidence also showed that in 1939 he had received gross income from his profession in the amount of $77,669.73, whereas he had reported gross income from his profession of only $20,264.63. This evidence consisted of testi-

mony of the witness Snyder (R. 88a–91a) that fees totaling $41,000 in 1938 and $40,084.99 in 1939 were paid to petitioner by Bethlehem Steel Company as legal fees in connection with the acquisition of the Williamsport Wire Rope Company by the Bethlehem Company and the admission of the petitioner that he received such amounts (R. 520a, 569a); the testimony of the revenue agent that according to petitioner's records he received fees from other clients totaling $16,532.22 in 1938 (R. 412a) and $14,592.16 in 1939 (R. 422a); the testimony of the witness Maloney (R. 211a–212a) and the witness Fear (R. 279a–280a) that petitioner received $25,903.79 of a check issued by Bethlehem Steel Company payable to E. J. Maloney & Company purportedly for accounting services rendered by Maloney; testimony of Snyder (R. 92a, 95a) that checks in the amounts of $25,000 and $34,990 were issued in 1938 to Martin Memolo, petitioner's brother, and the petitioner's admission that he received proceeds of such checks and had the same in his safe deposit box (R. 181a, 183a); testimony of the revenue agent that petitioner deposited in his bank accounts, apart from the fees from his various clients and proceeds of Bethlehem checks payable to him, cash in the amount of $4,600 in 1938 (R. 417a) and $22,992.58 in 1939 (R. 428a); and the admission of petitioner upon cross-exami-

nation that out of a check of approximately $30,000 paid by Bethlehem Steel Company to his office associate, John Crolly, a special master in the Williamsport receivership proceeding (R. 510a), he received $14,000 to $17,000 (R. 554a, 557a), and that he had "probably" told a grand jury that he had received all of the $30,000 (R. 558a–559a).

Two Bethlehem checks payable to the petitioner in the amounts of $36,000 and $40,084.99 and a Bethlehem check in the amount of $34,990 payable to Martin Memolo were deposited in an account in the Chase National Bank of New York City which was opened on December 17, 1938, by petitioner. (R. 115a, 118a, 122a.) On August 8, 1939, petitioner withdrew $110,000 (R. 123a–124a, 127a–128a) and had the money delivered to him in one thousand dollar bills at his office at Scranton (R. 145a–146a).

A Bethlehem check for $25,000 dated July 15, 1938, payable to Martin Memolo, was deposited in the Fidelity Deposit & Discount Bank of Dunmore in an account opened in the name of Martin Memolo on July 22, 1938, and cash in that exact amount was withdrawn the same day. (R. 265a.) The Bethlehem check was endorsed in the handwriting of petitioner's son (R. 589a), who actually cashed the check at the bank (R. 517a). Peti-

tioner admitted receiving this money (R. 517a) but contended that he held these funds, as well as the $34,900 deposited in the Chase National Bank, for his brother and repaid him at various times, the final payment being $20,000 in 1942 (R. 519a). On cross-examination he admitted that he maintained in his books of account a ledger sheet showing total loans to his brother for $1,449.35, commencing with a loan of $300 on August 18, 1938, and ending with a charge of $200 on February 12, 1943, and showing the only credit to the account a payment of $200 by his brother's widow on May 18, 1944. (R. 566a.) His brother's estate was appraised at $209.36 net (R. 694a), and petitioner admitted that he had filed a claim against the estate for the net amount shown due from his brother on his records (R. 567a).

With regard to the $25,903.79 received by petitioner from the $31,075 payment made by Bethlehem Steel Company to Maloney, Maloney testified that he conducted an audit for approximately one week in Williamsport of the Williamsport Wire Rope Company (R. 196a, 197a), that petitioner told him to make out a bill for $31,075 (R. 197a, 551a). Maloney actually received a fee from petitioner of $1,200 for his work but was instructed by petitioner to return the entire $31,075 on his (Maloney's) income tax return, which he did, and petitioner paid Maloney the further sum of $3,971.21 to take care of Maloney's taxes. (R. 203a–205a, 511a–512a.)

When questioned by the revenue agent and the special agent concerning the latter payment to Maloney, he told them that it might have been an "accommodation" or a "wash transaction." (R. 591a–595a.) In his own records, petitioner had expunged the name of the person to whom the $3,971.21 had been paid.

When the revenue agent first commenced his investigation in October 1939, he asked for substantiation of the gross fees of $42,357.60 reported in the return. Petitioner gave him an adding-machine tape showing a substantially similar total and containing items of $5,000 and $25,000. When questioned, petitioner refused to reveal the nature or source of the items. (R. 395a–399a.) Petitioner refused to produce any records with reference to the receipt and disbursement of fees from Bethlehem. (R. 354a–355a.)

ARGUMENT

1. Petitioner complains that his rights under the Fifth and Sixth Amendments to the Constitution of the United States were invaded by the trial judge in excusing a number of jurors at the outset of the trial and before selection of the trial panel. He states that these jurors were "regarded as favorable to the defense." (Br. 20.)

Although petitioner objected to the excusing of the jurors, saved an exception (R. 29a) and preserved the point in his assignment of errors

(R. 739a–742a), he abandoned the point in the Circuit Court of Appeals by failing to urge it. This Court will not ordinarily consider matters not raised in the court below. *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 322 U. S. 1; *Sonzinsky* v. *United States,* 300 U. S. 506; *Pacific States Co.* v. *White,* 296 U. S. 176; *White River Co.* v. *Arkansas,* 279 U. S. 692; *Blair* v. *Oesterlein Co.,* 275 U. S. 220.

Petitioner does not claim that the elimination of the jurors in question resulted in any failure to obtain a fair and impartial jury. As stated by this Court in *Hayes* v. *Missouri,* 120 U. S. 68, 71:

> The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert,* 116 U. S. 642. The right to challenge is the right to reject, not to select a juror.

Cf. *Hopt.* v. *Utah,* 120 U. S. 430; *Spies* v. *Illinois,* 123 U. S. 131, 168; *Holt* v. *United States,* 218 U. S. 245, 248.

The exclusion of jurors from the jury panel is within the discretion of the court. The exercise of such discretion will not be disturbed unless there has been an abuse of discretion. *Tex. & Pac. Ry.* v. *Hill,* 237 U. S. 208; *Lias* v. *United States,* 51 F. 2d 215 (C. C. A. 4th), affirmed, 284 U. S. 584.

In the instant case, the trial judge was obviously acting in the exercise of his sound discretion. In commenting upon the reasons for excus-

ing the jurors in question, the trial judge stated (R. 26a–27a):

> * * * Some of them on their own application, some because of obvious physical disability. Some have heart trouble and a woman here has had a stroke. One man here is suffering because of impaired hearing and the like. I don't think any of those people would make competent jurors in a case that may last several days. * * * the right to excuse jurors is within the discretion of the Court. The right of the defendant is to exclude jurors, not the right to select them. This is in the discretion of the Court, because on the information I have it is my judgment that these jurors because of matters that have come to my attention would not be competent jurors. Now, I don't intend to put forth in this record those reasons, because it has nothing to do with this case. * * * There is one juror I have excused, who is past beyond the age that I would consider a person for jury duty.

Whatever the source of the judge's information, whether by personal observation or as a result of investigation undertaken by either the prosecution or the defense and conveyed to the judge, there is no showing that there was an abuse of discretion in excluding the jurors in question. Petitioner's suggestion (Br. 24) that jurors were excluded because they might be favorable to the petitioner is wholly speculative. The affidavits

submitted by petitioner show that in one instance, the exclusion was on the ground that the juror "is apt to be prosecution-minded" (Pet. 14) and that a lawyer was excluded because he would be "naturally inclined to uphold the law" (Pet. 15).

2. Petitioner asserts that he was prejudiced by the conduct of the trial judge by his "abuse and ridicule * * * upon Petitioner's case and his attorney" (Br. 26) and by interruption of direct (Br. 40) and cross-examination (Br. 28). He cites some thirty-four instances in support of his claim. (Br. 26–57.)

A seriatim reading of these passages, removed as they are from their context, might well give a distorted and wholly inaccurate view of the trial. Cf. *United States* v. *Warren,* 120 F. 2d 211, 212 (C. C. A. 2d).

Close examination of the matters complained of by petitioner disclose that many of them involve the orderly procedure of the trial and proper efforts of the trial judge to confine the testimony to the real issues. The others involve the exercise of the trial judge's well established prerogative to question witnesses and to comment on the evidence. *Glasser* v. *United States,* 315 U. S. 60; *Horning* v. *District of Columbia,* 254 U. S. 135; *Simon* v. *United States,* 123 F. 2d 80 (C. C. A. 4th), certiorari denied, 314 U. S. 694; *Moore* v. *United States,* 132 F. 2d 47 (C. C. A. 5th), certiorari denied, 318 U. S. 784; *Pfaff* v. *United*

States, 85 F. 2d 309 (C. C. A. 7th); *Fryer* v. *United States,* 11 F. 2d 707 (C. C. A. 7th).

If at times the trial court spoke emphatically to counsel for petitioner, such emphasis appears to have been necessary. Cf. *United States* v. *Lee,* 107 F. 2d 522, 529 (C. C. A. 7th), certiorari denied, 309 U. S. 659. See, for example, R. 683a–685a, where counsel for petitioner persisted in asking an improper question after the court's ruling.

The evidence of petitioner's guilt was overwhelming. Nor does petitioner now contend that the evidence was insufficient to warrant his conviction. As stated in *Pfaff* v. *United States, supra* (p. 312):

> It was not the comment of the court that was prejudicial. * * * The deductions of any jury were more damaging than the observations of the court. * * *

In his charge to the jury the trial judge refrained from commenting on the evidence, and instructed the jury that it was not to be influenced by comments of the court during the trial, but that such comments should be disregarded. (R. 717a.) In view of such instruction, and the abundant evidence of petitioner's guilt, it cannot be said that the incidents complained of affected the outcome of the trial or deprived petitioner of a fair trial. *Glasser* v. *United States, supra; United States* v. *Lee, supra; Meyer* v. *United*

States, 67 F. 2d 223 (C. C. A. 9th); *United States* v. *Domres,* 142 F. 2d 477 (C. C. A. 7th), certiorari denied, 323 U. S. 723.

3. Petitioner claims the trial court erred in refusing to permit examination of notes taken by a witness during interview of the petitioner. The notes, however, were not used by the witness while on the stand (R. 361a–362a), and it was therefore proper to reject petitioner's request to see them. *United States* v. *Goldman,* 118 F. 2d 310, 314–315 (C. C. A. 2d), certiorari denied, 313 U. S. 588; *Little* v. *United States,* 93 F. 2d 401 (C. C. A. 8th), certiorari denied, 303 U. S. 644.

Petitioner asserts (Br. 60) that it was important that he see the notes in question to support his contention that he had repeatedly asked the revenue agent to inform him the extent of his tax liability. However, there was no issue as to this point as the agent testified that petitioner had made such inquiries on a number of occasions. (R. 383a–384a.) Thus, he was in no way prejudiced by the court's refusal to cause the production of the notes.

Nor is the decision below in conflict with *Morris* v. *United States,* 149 Fed. 123 (C. C. A. 5), as alleged by petitioner. (Pet. 8.) In that case the document used to refresh the witness' recollection was handed to the witness and used by him while he was on the stand.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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